No. 15150

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GLENN WEIBLE and PATRICIA WEIBLE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the Judgment of the United States District Court for the Southern District of California.

BRIEF FOR THE APPELLEE.

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BRIEF FOR THE APPELLEE.

Opinion Below.

The District Court wrote no opinion. Its findings of fact and conclusions of law [R. 30-40] are not reported.

Jurisdiction.

This appeal involves federal income taxes. The taxes in dispute were paid as follows: $696.13 on March 15, 1948 [R. 31-32]; $983.96 on March 15, 1949 [R. 32]; $1,305.70 on March 15, 1950. [R. 32.] Claims for refund were filed on January 31, 1951, and were rejected on March 27, 1952. [R. 31-33.] Within the time provided in Section 3772 of the Internal Revenue Code of 1939 and on July 14, 1953, the taxpayer brought an

action in the District Court for recovery of the taxes paid. [R. 32-33.] Jurisdiction was conferred on the District Court by 28 U. S. C., Sections 1340 and 1346. The judgment was entered on April 6, 1956. [R. 40.] Within sixty days and on May 8, 1956, a notice of appeal was filed. [R. 44.] Jurisdiction is conferred on this Court by 28 U. S. C., Section 1291.

Question Presented.

Whether the District Court erred in finding that the evidence did not support the taxpayer's contention that he was a bona fide resident of various foreign countries during the taxable years in question, within the meaning of Section 116(a), Internal Revenue Code of 1939.

Statute Involved.

Internal Revenue Code of 1939:

SEC. 116. EXCLUSIONS FROM GROSS INCOME.

In addition to the items specified in section 22(b), the following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(a) [As amended by Section 148(a), Revenue Act of 1942, c. 616, 56 Stat. 798, and Section 107(b), Revenue Act of 1943, c. 63, 58 Stat. 21] *Earned Income From Sources Without the United States.*—

(1) *Foreign resident for entire taxable year.*—In the case of an individual citizen of the United States, who establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts constitute

earned income as defined in paragraph (3); but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection.

* * * * * * * *

(26 U. S. C. 1952 ed., Sec. 116.)

Statement.

The facts as set forth in the District Court's finding of facts may be summarized as follows:[1]

In this action the taxpayers seek refund of income taxes paid for the years 1947, 1948, and 1949. [R. 31-33.] The contention in the taxpayer-husband's claim for refund for 1947 and in the joint claim of the husband and wife for 1948 and 1949 is that the income upon which the taxes were computed was exempt from taxation under Section 116 of the Internal Revenue Code of 1939.[2] [R. 33.]

All the income involved in the claims for refund in this action is attributable to the earnings of the taxpayer, Glenn Weible, for personal service rendered Max Factor and Company and was paid to the taxpayer by deposit to his bank account in Los Angeles, California. [R. 35-36.]

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[1]Trial was before the District Judge, sitting without a jury. Findings of Fact were based upon the oral testimony of the two witnesses, the taxpayer Glenn Weible and Mr. Michael Harris, and upon documentary evidence presented.

[2]References to "Code" or "Internal Revenue Code" refer to the Internal Revenue Code of 1939 unless otherwise noted.

In September, 1945, the taxpayer, Glenn Weible,[3] a chemical engineer, entered into employment with Max Factor and Company, a domestic corporation engaged in the manufacture of cosmetic products, as its representative to train personnel in its foreign branches and to organize and supervise the establishment in foreign countries of cosmetic manufacturing plants for the corporation. [R. 33.]

The taxpayer was employed by Michael Harris, a vice-president of Max Factor and Company in charge of the export division. There was no written contract or written memorandum of contract entered into between the taxpayer and his employer. The nature of the employment upon which the taxpayer was to embark was to be in connection with the expansion overseas of the manufacturing operations of the company. In 1945 and 1946, the company had plans to establish manufacturing plants in Australia and the Far East. The taxpayer was to be sent to a particular foreign place to set up a factory, to train citizens of the particular foreign country in the company manufacturing processes, and to leave when the operation was running smoothly with the citizens in charge. No particular length of time was fixed for his sojourn in any of the countries to which he was to be sent. [R. 34-35.]

Before the taxpayer commenced his overseas assignment he took in 1945 and 1946 a short refresher course in the California plant of the company. [R. 33.] Early in 1946 the taxpayer and his then wife, Jean Burt Weible,

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[3]Since all income involved in this action is attributable to the taxpayer-husband, future references to the "taxpayer" refer to the taxpayer-husband, Glenn Weible.

spent two or three months in Mexico. They maintained an apartment in California and owned household goods and an automobile. They also jointly owned an unimproved residential lot located in Los Angeles. The taxpayer maintained a membership in a private club, the Hollywood Athletic Club, during all the years involved. [R. 34.]

Prior to the taxpayer's departure for Australia the taxpayer and his then wife decided that she would not accompany him to Australia, but would maintain the apartment in North Hollywood and join him later. They had no children. [R. 34.] Before leaving the United States the taxpayer sold his automobile and left his household goods with his wife. [R. 35.]

The taxpayer traveled to Sydney, Australia, in June of 1946, as part of the Max Factor team of key employees to assist in setting up a manufacturing branch there. During 1946 his wife wrote him from Los Angeles that she desired a divorce, and this was obtained in 1947. In connection with the divorce, the taxpayer purchased from his wife for $7,500 her joint interest in the unimproved residential lot located in Los Angeles, California. During all the years involved in the litigation, the taxpayer continued to make substantial payments on the trust deed encumbering the property. [R. 35.]

While in Sydney, the taxpayer rented a furnished apartment on a one-year lease, and bought such necessary items as bedding and mattresses, kitchen utensils and china. He employed a housekeeper. [R. 36.]

The taxpayer secured exemption from the Australian income tax laws by filing with the Australian government a statement that he was a nonresident of Australia; that

his usual place of residence was the United States of America and that he anticipated leaving Australia in November of 1947. Because the Australian operation took longer than anticipated, the taxpayer actually stayed in Australia until October of 1948. From the period following June 15, 1948, he was not regarded as exempt from Australian taxes by the Australian government. However, his income for the period June 15 to June 30, 1948, was not large enough to subject him to the tax, and only the income from July 1, 1948, to October 9, 1948, was subjected to Australian taxes. [R. 36.]

During his stay in Australia the taxpayer met and became engaged to Patricia. At the conclusion of the Australian venture and after the manufacturing plant was manned by the Australian personnel, the taxpayer returned to the United States in October, 1948, for a two-weeks' stay. While there he married his present wife, the appellant Patricia Weible, his divorce having become final. [R. 36-37.]

The taxpayer was then sent to Toronto, Canada, by the company to set up a manufacturing establishment for a new product and container which had never been manufactured in Canada. He and his wife rented a furnished apartment in Toronto, and remained there until June of 1949 when the company ordered him to England to assist in the training and supervision of factory personnel in that country. The taxpayers remained continuously at the English branch until December, 1950, when he was called back to the United States for two months' training before being sent on an assignment to South America. [R. 37.]

The taxpayer entered into his employment with the intention of setting up manufacturing branches wherever

the company would send him, whether Australia, the Far East or elsewhere. He never, during the years involved, had the intention of becoming a permanent resident of either Australia, Canada, England or any other particular foreign country. During the years in question the taxpayers did not establish permanent homes in any of the countries in which they sojourned. They did not buy or establish a permanent residence or home in any of the countries. It was the intent of the taxpayer throughout the period to remain an employee of Max Factor and Company and he never had an intent to remain in any of the countries in which he sojourned other than as an employee of Max Factor and Company. He never intended to leave the company's employment and seek permanent employment in any of the countries in which he sojourned. By its very nature, his tour of duty in a foreign country for the company was temporary, company policy being to staff its foreign branches with citizens of the particular foreign country. [R. 37-38.]

During the year 1947, the taxpayer Glenn Weible, and during the years 1948 and 1949, Glenn and Patricia Weible, were residents of the United States of America. [R. 38.]

Based upon the above findings of fact, the District Court held that the taxpayer husband was not a bona fide resident of Australia in 1947; that the taxpayer and his wife were not bona fide residents of Australia or Canada during 1948; and that they were not bona fide residents of Canada and England during 1949. It was therefore held that the earnings of the taxpayer for the years in question were taxable, and judgment was entered in favor of the Government. [R. 39-40.] It is from this decision that the taxpayers appeal. [R. 44.]

Summary of Argument.

It is the contention of the taxpayer that he is entitled to a refund of his taxes paid for the years 1947, 1948 and 1949 because these taxes were computed on income which was allegedly exempt from taxation under the provisions of Section 116(a) of the Internal Revenue Code of 1939. That section excludes from gross income certain income of "an individual citizen of the United States, who establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year." The sole question at issue is whether this taxpayer was a bona fide resident of a foreign country or countries. The District Court held that he was not, and it is the position of the Government that this holding is well supported by the evidence presented.

At one time, the test for exemption was nonresidency in the United States, rather than the bona fide residency in a foreign country which is the present requirement. An analysis of the testimony and arguments presented by the taxpayer shows that he has directed his case towards proving nonresidency in the United States (the old requirement) and that he has failed to show a bona fide residency in any particular foreign country (the applicable requirement). The taxpayer has stressed the point that it was his intention to remain in foreign service, *i.e.,* not residing in the United States, rather than showing that he intended to become a resident of Australia, Canada or England. The findings of fact and the testimony of the taxpayer were to the effect that it was not the intent of the taxpayer to remain in any of the foreign countries which he visited for an indefinite period. Under

the terms of his employment he was to set up a manufacturing branch of his company in any given country and then to leave when the operation was running smoothly with nationals of the country in charge. While no particular length of time was fixed for the sojourn of the taxpayer in any particular country, it was understood at all times that his stay was to be only of a temporary nature. That the taxpayer so understood his residency is evident from the application he filed with the Australian government for the purpose of obtaining exemption from income tax and social services contribution. In this certificate the taxpayer stated that he was a nonresident of Australia. Other points of evidence convinced the District Court that the taxpayer was not a bona fide resident of a foreign country. He maintained a bank account in the United States, and his salary was deposited therein. He rented furnished apartments in both Australia and Canada, rather than a residence of more permanent nature. He maintained his membership in a private club in the United States. He owned an unimproved residential lot in Los Angeles and during all the years in question made substantial payments on the trust deed encumbering the property. He married his second wife in the United States although he met her in Australia. These facts, taken together, presented clear grounds for the District Court finding that the taxpayer was not a bona fide resident of any foreign country. This holding was supported by substantial evidence and is not clearly erroneous. Therefore it is submitted that the decision of the court below should be affirmed by this Court.

ARGUMENT.

The Taxpayer Was Not a Bona Fide Resident of Any Foreign Country During 1947, 1948 or 1949.

It is the contention of the taxpayer that he is entitled to a refund of his taxes paid for the years 1947, 1948 and 1949 because these taxes were computed on income which was allegedly exempt from taxation under the provisions of Section 116 of the Code, *supra.* Section 116 excludes from gross income—

> (a) *Earned Income From Sources Without the United States.*—
>
> (1) *Foreign resident for entire taxable year.*—In the case of an individual citizen of the United States, who establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year, amounts received from sources without the United States * * *

The only point at issue before the Court in this appeal is whether the taxpayer was a bona fide resident of a foreign country or countries during the taxable years in question. The District Court held that the taxpayer was not a bona fide resident of any of the foreign countries in which he was situated during the taxable years, and it is the position of the Government that this holding is well supported by the evidence presented.

While the exemption statute, as applicable in the case at bar, now concerns itself with citizens of the United States who are bona fide residents of a foreign country or countries, such was not always the case. At one time, the test for exemption was nonresidency in the United States, rather than a bona fide residency in a foreign

country. This Court, in *Downs v. Commissioner,* 166 F. 2d 504, 507-508, certiorari denied, 334 U. S. 832, discussed the legislative history of the exemption as follows:

> Prior to the amendment in 1942, the law exempted from tax the gross income of an individual citizen of the United States, who was a bona fide *non-resident* of the United States for more than six months during the taxable year. The purpose of the statute was to stimulate foreign trade, and to relieve United States citizens, resident in foreign countries, for periods of more than six months of the taxable year from taxation on income earned in the foreign country. The phrase "bona fide non-resident of the United States," as used in the statute, has been interpreted as including any American citizen *actually outside the United States* for more than six months during the taxable year. See *Commissioner of Internal Revenue v. Fiske's Estate,* 7 Cir., 128 F. 2d 487, certiorari denied 317 U. S. 635, 63 S. Ct. 63, 87 L. Ed. 512.
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> In 1942, a change in the statute reversed the situation, and, instead of exempting taxes because the citizen was a "non-resident" for half of the tax year, it exempted the citizen from the tax when he could satisfy the commissioner that he was a bona fide *resident* of a foreign country or countries during the entire tax year.

The history of Section 116(a) appears particularly pertinent to this case since an analysis of the testimony of the taxpayer and the arguments which he advances on appeal shows that he has directed his case towards proving nonresidency in the United States, and that he has failed

completely to show that he was a bona fide resident of any particular foreign country or countries. Irrespective of whether or not the taxpayer might be entitled to the tax exemption if the statute were in its pre-1942 state, it was clear to the Commissioner and to the District Court that he did not fulfil the prerequisites of the statute in its amended form. Now the determining factor is a showing of bona fide residency in a foreign country; and, as the legislative statements indicate,[4] residence means the maintenance of a real home establishment for a long period of time by a resident who assumes the obligations of a home in a foreign country. And it is so well settled as to be almost trite to state that the burden of proving the applicability of an exemption statute must be shouldered by the taxpayer. In *Jones v. Kyle,* 190 F. 2d 353 (C. A. 10th), certiorari denied, 342 U. S. 886, the court stated:

> A taxpayer asserting exemption from income tax must be able to point to an applicable statute granting the exemption and bring himself clearly within its terms. And a provision granting a special exemption

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[4]See S. Rep. No. 1631, 77th Cong., 2d Sess., p. 116 (1942-2 Cum. Bull. 504, 591); H. Conference Rep. No. 2586, 77th Cong., 2d Sess., p. 44 (1942-2 Cum. Bull. 701, 708). The statement by the Chairman of the Senate Committee on Finance, Senator George, is an aid in showing the intent of Congress at the time of the 1942 amendments (1 Senate Hearings on the Revenue Act of 1942, 77th Cong., 2d Sess., p. 743):

> I think it is recognized that the complete elimination of Section 116(a) was not really intended, that it was not the primary purpose in the case of the bona fide, nonresident American citizen who established a home and maintains his establishment and is taking on corresponding obligations of the home in any foreign country, but there is some need for treatment of this section, so that the technicians, American citizens who are merely temporarily away from home could be properly reached and properly dealt with for taxation purposes.

is to be strictly construed. *Helvering v. Northwest Steel Rolling Mills,* 311 U. S. 46, 61 S. Ct. 109, 85 L. Ed. 29.

The lower court came to the conclusion that the taxpayer had not borne this heavy burden, and this finding is supported by substantial evidence. It is urged that it therefore should be accepted by this Court as correct. See, *e.g., Dunn v. Commissioner,* 220 F. 2d 323 (C. A. 9th); *Slaff v. Commissioner,* 220 F. 2d 65 (C. A. 9th).

That the taxpayer was not a bona fide resident of Australia, Canada or England during the taxable years becomes apparent from the record. The oral testimony was in clear accord that it was not the intent of the taxpayer to remain in any of the foreign countries which he visited for an indefinite period. The very nature of his unwritten contract of employment with Max Factor and Company supports this conclusion. The taxpayer entered into his employment with the intention of setting up manufacturing branches of the company wherever the company would send him, his purpose being to organize and supervise the establishment of plants in various foreign countries for his employer. It was the policy of the company to train citizens of the particular foreign countries in its manufacturing processes, and when the operation was running smoothly to remove its American technicians and leave such citizens in charge. While no particular length of time was fixed for the sojourn of the taxpayer in any of the foreign countries to which he was to be sent, it was understood at all times that his stay in the country in each instance was to be only of a temporary nature. [Findings of Fact IX, XI, XXI, R. 33, 34, 38.]

Assuming *arguendo* that the taxpayer may have introduced evidence to the effect that he intended to remain in foreign employment only and not to reside in the United States, it does not logically follow that he of necessity became a bona fide resident of every foreign country in which he sojourned. As the lower court stated in its Finding XXI [R. 38]:

> By its very nature, his tour of duty in a foreign country for Max Factor & Company was temporary, company policy being to staff its foreign branches with citizens of the particular foreign country.

It can be seen that the terms of the taxpayer's employment contract precluded any intent on his part to be a bona fide resident of any of the countries in question. An intent to remain abroad does not equate with an intent to be a resident of any particular country. In each country he must have recognized that his stay was of a limited and temporary nature. One indication that such was the frame of mind of the taxpayer is presented in the Government's Exhibit A. [R. 89-96.][5] This exhibit sets forth

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[5]The taxpayer argues [Br. 17] that the fact that he—

> applied for and obtained exemption from Australian income tax has no significance in determining whether he was a "bona fide resident" there as that term is used in Section 116(a)(1) of the United States Internal Revenue Code of 1939.

Just why this is insignificant is not discussed, and the fact that the exemption from taxation was requested on the grounds of nonresidency in Australia appears extremely relevant to the Government. The Government does not proceed to prosecute its case because of the fact that the taxpayer did not pay taxes to Australia for the greatest part of the time that he was in that country. The point is that the taxpayer's own statement confirms the fact that he was not a resident of Australia. It should be noted, however, that the nonpayment of taxes, while perhaps not conclusive in itself, is certainly a factor in the determination of whether or not a person is a bona fide resident of any particular country.

the application filed by the taxpayer with the Commonwealth of Australia for the purpose of obtaining exemption from income tax and social services contribution during the second year of his visit in Australia. In this certificate the taxpayer stated that he was a *nonresident* of Australia, and alluded to the temporary nature of his visit in that country. The taxpayer also reaffirmed the conditions of his employment when he described his duties in Australia as "To train local chemists in application of formulae and manufacturing operations in formulating products." [R. 93.] Once these local chemists were trained it was the intention of the taxpayer to leave the country, to move to another foreign country at the will of his employer. He recognized that his tenure in Australia, as well as in each of the other foreign countries he visited, was to be of a limited duration, he never intended to settle down in that country, and he fully intended to continue his employment with Max Factor and Company even though he recognized that his duties in connection with this employment would shortly call him to other shores. Once again, the Government can do no more than reiterate that the fact stressed by the taxpayer in testimony and argument, his intent to remain abroad for an indefinite period, is not relevant to a determination of whether or not the taxpayer established a bona fide residency in any particular foreign country. It is the establishment of such a bona fide residency that under Section 116(a) will determine whether the taxpayer's earnings are exempt from income taxation. When the statute requires that the taxpayer must be a bona fide resident of a foreign country or countries, it of course means that at any given time the taxpayer must be a bona fide resident of one particular foreign country. A

general intent to remain outside the geographical confines of the United States does not in itself satisfy this requirement. The statute does not call for a bona fide intent of nonresidency in the United States, as the taxpayer's argument presupposes.

While it is not the position of the Government that a prerequisite to the establishment of a bona fide residency is an intent to stay in the foreign country permanently, it is necessary that there be at least some intent to stay in the one country in question for an indefinite period of time, not limited by either a specific departure date or by a specific short-term job. In the case at bar the taxpayer knew that he would stay in each foreign country for only a relatively short period of time.[6] In the cases which the taxpayer cites as supporting his claim for exemption from tax, the relevant factual situations present a far different pattern of intent than that of the instant case. In *Meals v. United States,* 110 F. Supp. 658 (N. D. Cal.), the taxpayer went to just one foreign country, Germany, and planned to remain in that specific country

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[6]The testimony of the taxpayer shows that from his employment with Max Factor and Company in September, 1945, his time was spent approximately as follows [R. 60, 61, 62-63, 64, 70, 73, 74, 76]:

September 1945-December 1945, United States
January 1946-April 1946, Mexico
May 1946-United States
June 1946-October 1948, Australia
November 1948, United States
November 1948-July 1949, Canada
August 1949-December 1950, England
December 1950-February 1951, United States
February 1951, South America

for a substantial and indefinite period of time. The testimony of the taxpayer at bar can lead only to the conclusion that he did not intend to remain in any one foreign country for a substantial and indefinite period of time but rather that he anticipated moving from foreign country to foreign country in connection with his duties with Max Factor and Company. Likewise, in *White v. Hofferbert,* 88 F. Supp. 457 (Md.), the taxpayer was assigned by his company to service in Sweden for an *indefinite* period. The stay of the taxpayer herein in each of the foreign countries in which he was situated was always terminable at the time the plant operations of the company were running smoothly. Thus, although the taxpayer did not of necessity know the precise date upon which he was to leave the country, he always knew that upon the fulfillment of his specific mission he would move on to another foreign country. Hence, his stay in these countries cannot be termed indefinite; he must be considered a mere transient or sojourner.

Likewise undoubtedly of importance to the District Court in its conclusion that the taxpayer was not a bona fide resident of any foreign country were several other factors. The taxpayer's salary was deposited to his bank account in Los Angeles, California. [R. 36.] He rented a furnished apartment in Australia on a one-year lease [R. 36], and likewise rented a furnished apartment while in Canada [R. 37], rather than residences of a more permanent nature. He maintained his membership in a private club in the United States during all the years

involved. [R. 34.] He owned an unimproved residential lot in Los Angeles, and in fact, purchased from his first wife her joint interest in the lot after he had left the United States, making substantial payments on the trust deed encumbering the property during all the taxable years. [R. 35.] He married his second wife in the United States, although he met her in Australia. [R. 36-37.] While any of these factors might appear insignificant viewed *in vacuo,* their sum total together with the temporary nature of the taxpayer's stay in any given foreign country and his nonpayment of taxes to these foreign countries[7] serves to weave a pattern of conduct which implies that the taxpayer never had any intention to become a bona fide resident of these foreign countries. So held the District Court upon hearing the evidence, and it is submitted that, since this finding was supported by substantial evidence and was not clearly erroneous, it should be accepted by this Court. *Dunn v. Commissioner, supra.*

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[7]The taxpayer paid taxes to Australia for only the last four months of his sojourn in that country. [R. 36.] He testified on cross-examination that he did not pay Canadian or English income taxes. [R. 79.]

Conclusion.

For the foregoing reasons, it is submitted that the decision of the District Court that the taxpayer was not a bona fide resident of any foreign country during the years in question is clearly supported by the evidence and should be affirmed.

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